



WESTERN RESOURCE
ADVOCATES

Advancing Solutions for the Western Environment

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Re: PROTEST OF OIL AND GAS LEASE SALE – UTAH, August 16, 2005
PARCELS UT-301 and UT-313 through UT-325 located in the Uinta National Forest.

This Protest is filed by **Red Rock Forests, Citizens' Committee to Save Our Canyons, High Uintas Preservation Council, Utah Rivers Council, Utah Environmental Congress, and Utah Chapter of Sierra Club** (collectively "Red Rock Forests") pursuant to 43 CFR 3165.3(b). Red Rock Forests protests the inclusion of the following fourteen proposed lease parcels in the August 16, 2005 Competitive Oil and Gas Lease Sale to be held by the Utah State Office of the Bureau of Land Management (BLM):

- UT-315-326 (parcels wholly or partially within Inventoried Roadless Areas); and,
- UT-313 & 314 (additional Uinta National Forest parcels).

This protest is directed to (1) the National Forest Service ("Forest Service"), as the agency with surface management authority and the legal responsibility to conserve surface resources, and (2) the Bureau of Land Management ("BLM"), the agency responsible for the lease sale, lease administration, and subsurface minerals management. Collectively, the Forest Service and the BLM are referred to as "the agencies." Either agency has the authority and the responsibility to withdraw these lands from the lease sale or impose adequate stipulations to ensure compliance with applicable law and policies.

I. INTRODUCTION

The fourteen protested parcels encompass 26,400 acres within the Uinta National Forest. In total, 19,900 acres of the proposed lease parcels overlap inventoried roadless areas (IRAs) as designated by the Forest Service. Exhibit 1. Specifically, all or portions of parcels UT-315-326 overlap IRAs. Accordingly, the Forest Service has recognized the substantial value in the roadless character of these areas and must undertake site-specific analyses prior to leasing. Also, the roadless character of these parcels should be protected in accordance with the illegally revoked roadless rule.

Moreover, each Uinta National Forest parcel proposed for leasing harbors diverse resource values including, but not limited to, high quality wildlife habitat, essential riparian areas, vital viewsheds, high value watersheds, and important fisheries. Despite the presence of these resources, the agencies have not sufficiently analyzed the impacts of oil and gas development on these values prior to offering these lands for lease. Therefore, the agencies have failed to comply with their duties under the National Environmental Policy Act (NEPA) in connection with the lease sale. By the same token, the agencies, in offering the parcels for lease without complying with their other legal obligations, have violated the Federal Onshore Oil and Gas Leasing Reform Act (FOOGLRA), the National Forest Management Act (NFMA), the Endangered Species Act (ESA), and the National Historic Preservation Act (NHPA).

As a result, the agencies must remove these parcels from the lease sale until they fully meet their statutory and regulatory duties. Moreover, the value of the resources contained within these parcels and the threat to these resources posed by the lease sale and any subsequent oil and gas development may require that the parcels be permanently closed to any oil and gas development.

II. STATEMENT OF STANDING

Red Rock Forests, based in Moab, Utah, has approximately 315 members, many of which reside in Utah. Red Rock Forests' mission is the preservation of Utah's forested habitats. Red Rock Forests relies on sound biological principles to guide its policy, goals, and decision-making, with a particular emphasis on conservation biology. Red Rock Forests uses citizen action, community organizing, and collaborative agreements, as well as legal challenges, to further its conservation mission. Red Rock Forests maintains a particular interest in the forested uplands of Utah's national forests. Red Rock Forest members and staff frequently visit the Uinta National Forest on a regular basis—traveling specifically to the areas encompassed by the lease sale, including

the inventoried roadless area lands at issue in this protest. Members hike, camp, observe wildlife, photograph scenery, and find emotional and spiritual sustenance in the forested lands in Utah, including lands on the Uinta National Forest. Red Rock Forests' members' enjoyment of the Uinta National Forest will be severely diminished by oil and gas development and/or leasing.

Citizens' Committee to Save Our Canyons ("SOC") is a Salt Lake City, Utah grassroots environmental organization organized in 1972 to respond to the numerous environmental threats to the Wasatch Mountains. SOC has a membership of approximately 1,000 individuals, most of who reside along the Wasatch Front. SOC's mission is to protect the natural environments of the public lands along the entire Wasatch Range and nearby forestlands, from the Wellsvilles to Mt. Nebo. SOC achieves this mission through active involvement in planning processes at city, county, state, and federal levels. SOC raises awareness on issues of concern through various outlets including publishing a quarterly newsletter, organizing the Wasatch Front Forum, hosting a radio show on KRCL (90.9 FM), and directing an extensive volunteer program. SOC maintains a particular interest in the regions of the Uinta National Forest being offered for oil and gas leasing. SOC members frequently visit the Uinta National Forest to hike, camp, identify plants, observe birds and wildlife, soak in natural hot springs, and photograph the scenery. SOC members have visited the area of Uinta National Forest proposed for oil and gas leasing and intend to return within the next year. SOC members' enjoyment of the Uinta National Forest, in particular the land proposed for oil and gas leasing, will be adversely affected by oil and gas development and/or leasing.

High Uintas Preservation Council (HUPC) is a non-profit conservation organization whose mission is to preserve and restore the integrity of the Uinta Mountains ecosystem. To accomplish this mission and maintain the inherent biodiversity and natural processes of this area, HUPC fosters ecological literacy, activism, and community-based solutions, and encourages the accountability of public decision makers. HUPC members and staff have an intense interest in management decisions affecting the Uinta National Forest because members and staff regularly use and enjoy the Forest to observe wildlife, hike, camp, boat, take photographs, and engage in other environmental, aesthetic, and recreational activities. In particular, HUPC advocates for the conservation of Uinta National Forest IRAs because of their enormous value as habitat and corridors for wildlife, which in the future may include Canada lynx and wolverine. Oil and gas development within the Uinta National Forest adversely affects the environmental, scenic, aesthetic, recreational, and spiritual interests of HUPC members and staff.

Utah Rivers Council works to protect our ecosystems by educating and involving everyone in the decisions being made about our rivers, our finances, and our management of our water. Utah Rivers Council seeks the most fiscally and environmentally conservative policies to meet water supply needs and protect our river ecosystems through grassroots organizing, citizen-led legislation, research, education, and community leadership. Utah Rivers Council members regularly explore and enjoy the Uinta National Forest, including the scenic Fifth Water Creek.

The Utah Environmental Congress is a non-profit organization dedicated to maintaining, protecting, and restoring the native ecosystems of Utah. The UEC has an organizational interest

in the proper and lawful management of National Forests located in Utah, including the Uinta National Forest. The UEC's members, staff, and board members participate in a wide range of hiking, hunting, fishing, photography and other recreational activities on the Uinta National Forest, including the area in and surrounding the proposed lease areas. The UEC represents 228 individual members, 16 organizations, and 43 businesses representing approximately 30,000 people, many of whom have visited the Uinta National Forest and the White River, and have a direct interest in its management.

The Utah Chapter of the Sierra Club ("Utah Chapter") is a group of members and volunteer activists dedicated to preserving and enjoying the land and quality of life in Utah and the West. The Utah Chapter has more than 5,000 members statewide. The Utah Chapter's members use and enjoy the Uinta National Forest for hiking, solitude, bird and wildlife watching, angling, photography, and other environmental, spiritual, aesthetic, and recreational pursuits. The Utah Chapter's members regularly visit the Uinta National Forest, including the Diamond Fork IRA, and intend to continue to visit these biologically important areas in the near future. The Utah Chapter is involved in public land decision-making by reviewing environmental documents, representing environmental interests at public meetings and hearings, and researching and writing on specific public land and environmental health issues. Utah Chapter volunteer and members' interests will be adversely impacted by oil and gas exploration and development and/or leasing.

III. STATEMENT OF FACTS

The August 2005 lease sale offers for oil and gas development 26,400 acres of the Uinta National Forest, of which 19,900 acres are wholly or partially within IRAs. Exhibit 1. These parcels support a host of crucial resource values particularly cherished by the individuals that visit these areas. These resources range from high quality wildlife habitat, essential riparian areas and fisheries, to vital viewsheds and watersheds, and areas known for their recreational value. A significant amount of both public and private funds have been invested in many of these areas for the express purpose of maintaining and restoring ecosystems that support angling, hunting and wildlife viewing.

Angling, hunting and wildlife viewing are beloved pastimes and of utmost importance to Utah's economy. There are 388,000 resident anglers in Utah, comprising 16% of the state population. Trout Unlimited, *Gas and Development on Western Public Lands*, available at: www.valle Vidal.org/Downloads/TU_Oil_Gas_low.pdf. 177,000 Utah residents are hunters and 515,000 residents, or 22 percent of the state population, participate in wildlife viewing. *Id.* 681,000 non-Utah residents come to Utah to engage in these same activities. In total, people participating in these activities contribute 1.24 billion dollars to Utah's economy each year. *Id.*

A. Diamond Fork Drainage

A number of the Uinta National Forest parcels being offered for oil and gas leasing are in the Diamond Fork drainage, an area important for its fisheries, recreational opportunities and

wildlife habitat. Diamond Fork and Sixth Water creeks are Utah Blue Ribbon Fisheries. The designation as a Utah Blue Ribbon Fishery was recommended by the Governor's Blue Ribbon Fisheries Advisory Council and approved by the Director of Utah Division of Wildlife Resources ("DWR"). The public, including the Utah Chapter of Trout Unlimited, has partnered with DWR, Central Utah Project Mitigation Commission on Strawberry Valley ("Mitigation Commission") and others to fund and participate in extensive restoration work aimed at enhancing the fisheries of the area. Recently, in recognition of the importance of these drainages, the Mitigation Commission dedicated over three million dollars to the protection and rehabilitation of the Sixth Water and Diamond Fork drainages.

The Mitigation Commission and the Forest Service together also authored the Diamond Fork Area Assessment. This study documents the ailing condition of Sixth Water and Diamond Fork watersheds, including downcutting, bank instability and poor riparian condition, and finds that roads and the associated erosion and sediment delivery is having an adverse impact on riparian health and the condition of fisheries. The assessment does not contemplate oil and gas development in the area.¹

Diamond Fork Creek and Sixth Water Creek are both failing to meet their beneficial uses as cold water fisheries. Both waters are impaired due to flow alteration, riparian habitat alteration, and stream habitat alteration. Forest Plan FEIS at C-16.

B. Inventoried Roadless Areas

The importance of the resources of the Diamond Fork drainage is further underscored by the Forest Service's own description of the IRAs that are found in this watershed. In offering the parcels for lease, the agencies have declared open for development significant portions of each of these IRAs.

i. Pump Ridge IRA

The 25,700-acre Pump Ridge IRA is located about ten miles east of Springville, Utah in the Hobbie Creek drainage, part of the Diamond Fork watershed. *Id.* at C-87. The Pump Ridge IRA is an area of extremes, characterized by rugged terrain and thick undulating forests. The IRA provides excellent opportunities for outdoor recreation, including: hiking, developed and dispersed camping, photography, hunting, mountain biking, off highway vehicles and horseback riding. The Pump Ridge IRA is a "major recreation area." *Id.* at C-83.

Portions of the Pump Ridge IRA have been classified by DWR as "High Value Winter Range" for elk. *Id.* at C-84. Two federally designated sensitive species inhabit this IRA, the northern goshawk and the Bonneville cutthroat trout. *Id.* at C-87. Northern goshawks utilize this area for nesting and foraging. *Id.* at C-84. The Bonneville cutthroat trout occupy several tributaries of Diamond Fork Creek within Pump Ridge. *Id.* at C-87. Diamond Fork Creek is a 303(d) listed stream for flow alteration, riparian habitat alteration, and stream habitat alteration. *Id.*

¹ Available at http://www.mitigationcommission.gov/watershed/diamondfork/pdf/df_assessment.pdf.

Numerous state sensitive and state sensitive candidate species inhabit the Pump Ridge IRA including Virginia's warbler, bald eagle, western yellow-billed cuckoo, Lewis' woodpecker, black-throated gray warbler, spotted bat, western red bat, rubber boa, smooth green snake, Sonoran mountain kingsnake, Utah milk snake and taiga bluet. Id. According to the Forest Service, the Pump Ridge IRA "is valuable for watershed purposes and wildlife habitat." Draft Western Uinta Basin Oil and Gas EIS at 3-63.

The Pump Ridge IRA contains landslide prone soils. Forest Plan FEIS at C-87. The entire area lies within the Utah County airshed, which is a non-attainment zone under the Clean Air Act. Id.

ii. Two Tom Hill IRA

At 14,570 acres, the Two Tom Hill IRA experiences some of the highest rates of recreational uses in the region. Hiking, horseback riding, fishing, big game hunting and mountain biking occurs throughout this unit. Id. at C-89. Within the Two Tom Hill, "unauthorized ATV use is evident." Id.

The Two Tom Hill IRA contains landslide prone soils. The IRA encompasses small tributaries that feed Strawberry Reservoir, as well as Sixth Water and Diamond Fork creeks. The Reservoir and Sixth Water and Diamond Fork creeks are each 303(d) listed watercourse. Id. at C-93. These watercourses sustain a Bonneville cutthroat trout metapopulation. Id.

This area supports diverse habitat for a variety of wildlife species. It is both a home and a corridor for large mammals like moose, black bear, cougar, elk and mule deer. There are populations of northern goshawk and numerous other sensitive species, including the state sensitive boreal toad. Much of the IRA lies in Utah County, which is a non-attainment air quality zone. The Two Tom Hill IRA exhibits moderate potential for cultural resources. Limited inventory work has been done and one historical structure site has been documented. Id. at C-90.

iii. Red Mountain IRA

The Red Mountain IRA consists of 9,950 acres and is located 12 miles east of Mapleton, Utah in the Diamond Fork drainage. The area is of relatively steep terrain with vegetation consisting mostly of oak brush and maple. Id. at C-95.

Recreation usage of the area is diverse, and includes such activities as camping, hiking, horseback riding, and mountain biking. Id. In the fall, this area is heavily hunted and in the winter sees considerable snowmobile use. Additionally, heavy amounts of unauthorized ATV use have been observed. Id.

A variety of wildlife thrives in this area. Red Mountain provides both summer and winter deer and elk habitat and portions of the area are classified as Critical Winter Range for deer. Id. at C-96. Documented goshawk nests are located here, and the area functions as important black bear breeding and denning habitat. Id. As a wildlife corridor, this IRA serves large mammals such as

black bear and cougar, and provides a potential corridor for wolverines and Canada lynx. Id. Portions of this roadless area were purchased by the Bureau of Reclamation to mitigate impacts to big game winter range caused by activities of the Central Utah Project. Id. The area also contains tributaries to Diamond Fork Creek, which is a 303(d) listed stream. Id. at C-100.

The BLM has acknowledged the watershed and wildlife values of this area are “very important.” Draft Western Uinta Basin Oil and Gas EIS at 3-64.

iv. Diamond Fork IRA

Population centers of Utah County lie in close proximity to the Diamond Fork IRA. Many roads surround the IRA and allow visitors easy recreational access into the area. At 35,230 acres, the Diamond Fork IRA is the largest unit within which the Forest Service proposes leasing. Forest Plan FEIS at C-108. The Diamond Fork IRA offers year-round recreation. Fifth Water Hot Springs attracts numerous year-round visitors. Id. Hikers, bikers, snowmobilers and OHV users make use of designated trails that access this area, but which lie outside the IRA itself. Id.

There are also several popular fishing streams within this unit, including Diamond Fork Creek, which forms the border of the IRA. Id. C-113. This stream and its tributaries sustain a population of Bonneville cutthroat trout within the unit. The Diamond Fork IRA, which also contains Sixth Water Creek, “is valuable as a watershed area.” Draft Western Uinta Basin Oil and Gas EIS at 3-65.

In addition, DWR has classified this area as winter and summer range for deer, as well as “High Value Winter Range.” Forest Plan FEIS at C-109. There are two known historic golden eagle eyries within the unit, which serve as a year-round foraging area for this species. Id. at C-109. Bald eagles also forage this area in the winter. Id. at C-109. In addition, habitat for the peregrine falcon is present within the Diamond Fork IRA. Id. at C-113. Numerous sensitive, threatened and candidate species inhabit the area, including Townsend’s big-eared bat, the sandhill crane, the northern three-toed woodpecker, the rubber boa and Virginia’s warbler. Id. at C-113.

Musk thistle, Canada thistle and hoary cress are invasive plant species present on this IRA. Id. at C-113. As well, this IRA lies within Utah County’s non-attainment airshed. Id. at C-108.

IV. Procedural Background and Legal Framework

According to BLM’s Notice of Competitive Lease Sale list for the August 16, 2005 lease sale, BLM intends to lease fourteen parcels within the Uinta National Forest. The Forest Service did not conduct any site-specific analysis prior to authorizing BLM to offer these parcels. Rather, according to the Forest Service, “[t]he decision to authorize the issuance of oil and gas leases for these lands is contained in the Record of Decision dated September 1997, which is based on the Final Environmental Impact Statement (FEIS), Western Uinta Basin, Oil and Gas Leasing on the Uinta National Forest.” See e.g. Letter from Jack G. Troyer, Regional Forester, Forest Service to

Sally Wisely, State Director, BLM (May 20, 2005). In addition, the Forest Service indicates that “[t]his leasing decision was incorporated into the Uinta Revised Forest Plan (May, 2003) by reference.” *Id.* Neither agency sufficiently informed the Fish and Wildlife Service (FWS) of the intention to lease these parcels in the Uinta National Forest. Therefore, the agencies never gave FWS the opportunity to evaluate the Uinta National Forest parcels for wildlife issues.

As previously mentioned, the Forest Service maintains that the Forest Service incorporated the 1997 Western Uinta Basin Oil and Gas EIS into the Uinta National Forest Land and Resource Management Plan (“Uinta National Forest Plan”) by reference. However, as discussed further below, simply referencing the Final Oil and Gas EIS fails to ensure that the protections mandated by the Uinta National Forest Plan or Western Uinta Basin Oil and Gas EIS have been properly implemented into the proposed parcels.

According to the 1997 Western Uinta Basin Oil and Gas EIS, “[a] [controlled surface use stipulation] will ensure that impact to . . . roadless areas can be minimized when locating and designing facilities.” Western Uinta Basin Oil and Gas ROD at 5. The Forest Service also notes that “[s]ubsequent leasing decisions and associated [oil and gas] activities may affect the character of these areas.” Final Western Uinta Basin Oil and Gas EIS at Questions and Answers #12. Moreover, “[o]il and gas exploration and development activities, including access roads, well pads and operational activities would increase vehicular traffic and human activities resulting in a loss of natural integrity and appearance within roadless areas.” Draft Western Uinta Basin Oil and Gas EIS at 4-50; *see also Id.* (“Exploration and development activities would impact the various roadless characteristics in some areas to the extent that the area could no longer be effectively managed as a roadless area, for as long as the activity continued”). By requiring only a controlled surface use stipulation for roadless areas, the Forest Service acknowledged that “[s]ince access and surface occupancy of the leasehold would be allowed if this leasing option were adopted, impacts to the roadless character could not be avoided.” Draft Western Uinta Basin Oil and Gas EIS at 4-51; *see also Id.* (“other effects on other values and resources, such as wildlife, that may be dependent on the roadless character[,] would not be avoided”).

According to the Western Uinta Basin Oil and Gas EIS, the reasonably foreseeable scenario is that a total of 6.9 acres of land, including only 4.92 acres of road construction, will be disturbed on the Uinta National Forest pursuant to oil and gas development. Draft Western Uinta Basin Oil and Gas EIS at 4-51 to 52. This contrasts with the Forest Service decision now to offer 19,900 acres of roadless areas in the Uinta National Forest for oil and gas development with limited stipulations to restrict surface disturbances. During the forest plan revision process, the Forest Service acknowledged that already, the reasonably foreseeable development scenario “has been realized, though earlier wells have been non-producers.” Forest Plan FEIS at 3-106. In addition, the Forest Service anticipated no mineral development in each of the IRA. *See e.g. Id.* at C-111 (anticipating no mineral development in the Diamond Fork IRA).

In revising the Forest Plan in 2003, the Forest Service acknowledged that “roadless areas provide sources of public drinking water, opportunities to manage for dispersed recreation, and

undisturbed landscapes that provide privacy and seclusion.” *Id.* at 3-559. Moreover, “these areas serve safeguards against the spread of invasive species and often provide important habitat for rare plant and animal species.” *Id.* at 3-559. According to the Forest Service, the Uinta National Forest IRAs “support a diversity of native species and provide opportunities for monitoring and research.” *Id.* at 3-559.

In addition, during the forest plan revision process, the Forest Service determined that it was required to undertake site-specific analysis prior to leasing decisions. According to the Forest Plan FEIS,

[t]he alternatives analyze [a] situation where the **minimum management requirements** (i.e., leasing stipulations) listed above would be applied. However, **before leasing decisions** for Alternatives B, C, D, E, F, G, and H **could be made, a more detailed site-specific analysis must be conducted.**

Id. at 3-102 (emphasis added); see Forest Plan ROD at 3 (selecting Alternative H). Generally, the minimum stipulations for leased parcels would be determined through the use of the Recreation Opportunity Spectrum (ROS) class for the given parcel. *Id.* at 3-102. However, “in addition to utilizing the ROS, resource specific items are identified for additional consideration . . . that in combination would provide the basis for which a leasing decision could be made **at the site-specific level.**” *Id.* at 3-102 (emphasis added); see also Forest Plan FEIS at 3-107 (The selected alternative “includes opportunities that will allow mineral activities to occur, especially areas for leasing oil and gas and other leasables. **More site-specific analysis by the Forest line officer will be required at the time proposals are received**”). *Id.* at 3-107 (emphasis added).

The Forest Service also acknowledged that certain aspects of the Western Uinta Oil and Gas EIS may require modification prior to leasing:

Leasing decisions associated with the high and moderate potential areas may require some level of modification to address resource concerns and apply resource management direction as specified in the revised Forest Plan. These changes, if necessary, **would be addressed in site-specific analysis at the time a leasing proposal is considered.**

Id. at 3-103.

The Forest Service indicates that it has relied on the minimum management requirements or stipulations set forth in the Western Uinta Basin Oil and Gas EIS to determine the necessary stipulations for the proposed parcels. As a result, the parcels are primarily subject to controlled surface use stipulations.² The lease notice fails to indicate that most of the protested parcels are partially or wholly within IRAs. Although the lease notice provided for various stipulations and

² Controlled Surface Use means “[u]se and occupancy is allowed (unless restricted by another stipulation), but identified resource values require special operational constraints that may modify the lease rights. CSU is used for operating guidance, not as a substitute for the NSO or timing stipulations.” Western Uinta Basin Oil and Gas FEIS at A-2.

special provisions, these stipulations or provisions do not relate to the roadless character or the full range of resource values of the proposed parcels. For example, the no surface occupancy ("NSO") stipulations only prohibit development on slopes greater than 35%.³

V. LEASING THE UINTA FOREST PARCELS VIOLATES NEPA AND NFMA

The agencies have violated NEPA and NFMA by offering the fourteen parcels for oil and gas development. This violation of NEPA occurred because the agencies have not completed adequate environmental review of the areas that will be leased without no surface occupancy stipulations. In addition, the agencies violated NFMA by failing to ensure that the leasing of the protested parcels is consistent with the Revised Forest Plan. See 16 U.S.C. § 1604(i).

Leasing of roadless lands that may be eligible for wilderness "require[s] preparation of an EIS unless the lease absolutely prohibits surface disturbance in the absence of specific governmental approval." Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1227 (9th Cir. 1988)). In the instant case, NEPA documentation must be completed prior to leasing the roadless parcels to ensure, or at the very least to consider, stipulations that fully protect wilderness characteristics of these lands.

IBLA precedent confirms that pre-leasing NEPA analysis is required under these circumstances. Once the BLM issues a lease without adequate NSO stipulations, denial of future APDs and the imposition of NSO stipulations are no longer an "available alternative" for future NEPA analysis at the APD stage. Southern Utah Wilderness Alliance, IBLA 91-330, Slip Op. at 6. "If BLM has not retained the authority to preclude all surface disturbance activity, then the decision to lease is itself the point of 'irreversible, irretrievable commitment of resources' mandating preparation of an EIS." Union Oil Co. of Cal., 102 IBLA 187, 189 (1988). IBLA decisions and federal case law are consistent with the Forest Service Handbook, which provides that proposals to construct roads and substantially impair the roadless character of IRAs require an EIS. FSH 1909.15, sec. 20.6. (Class 3).

Moreover, the IBLA has recognized that "when BLM adopts the FEIS of another agency in lieu of performing its own environmental analysis and relies on it as the basis for an exercise of its own decisionmaking authority, this Board properly may review that FEIS to determine whether BLM's decision is supported by the record, guided by the same principles ordinarily applicable to an FEIS prepared by BLM." Wyoming Outdoor Council, 159 IBLA 388, 401 (2003). Accordingly, "before issuing an oil and gas lease, and thus irreversibly and irretrievably committing to the exploration and development of the oil and gas resources in the leased lands, section 102(2)(C) of NEPA requires an agency to assess the potential environmental impacts of

³ The absence of NSO stipulations to protect riparian areas appears to contradict the minimal management requirements or stipulations required by the Western Uinta Basin EIS imposed "to require that activities are located or designed so as to minimize surface disturbing activities and protect riparian areas." Western Uinta Basin Oil and Gas ROD at 6. Although Red Rock Forests appreciates the inclusion of the slope NSO stipulation, the provisions fail to adequately maintain the character of the IRAs.

such exploration and development.” *Id.* at 401-402. Pursuant to NEPA and the Uinta National Forest Plan, this pre-leasing environmental analysis must be site-specific.

Although the Forest Service suggests, and BLM adopts the position that the Western Uinta Basin Oil and Gas EIS sufficiently analyzed the consequences of oil and gas leasing in the Uinta National Forest, this assertion is not supportable. The analysis in that document is not sufficient to meet the Forest Service’s obligation to analyze the site-specific consequences of the proposed oil and gas leasing on roadless areas or other significant resource values on the Uinta National Forest. Moreover, the Western Uinta Basin Oil and Gas EIS pre-dates the Uinta National Forest Plan revision. Thus, in its Western Uinta Basin Oil and Gas EIS, the Forest Service was not privy to the bulk of the analysis it generated in the forest plan revision process. As a result, the agencies can not rely on this document to fulfill their NEPA obligations.

Most importantly, in revising the Forest Plan, the Forest Service specifically decided that the agency **must** undertake site-specific environmental analysis prior to offering any leases for sale on the Uinta National Forest.⁴ Forest Plan FEIS at 3-102 (“[t]he alternatives analyze situation where the minimum management requirements (i.e., leasing stipulations) listed above would be applied. However, before leasing decisions for Alternatives B, C, D, E, F, G, and H could be made, **a more detailed site-specific analysis must be conducted**”)(emphasis added); *see also* Forest Plan FEIS at 3-102 (“in addition to utilizing the ROS, resource specific items **are** identified for additional consideration . . . that in combination would provide the basis for which a leasing decision could be made at the site-specific level”)(emphasis added); Forest Plan FEIS at 3-107 (The selected alternative “includes opportunities that will allow mineral activities to occur, especially areas for leasing oil and gas and other leasables. More site-specific analysis by the Forest line officer **will be required** at the time proposals are received”)(emphasis added). By the same token, the Forest Service determined that it could not properly manage oil and gas development at the leasing stage and could not adequately define the relevant lease stipulations until it completed this required site specific analysis:

[l]easing decisions associated with the high and moderate potential areas may require some level of modification to address resource concerns and apply resource management direction as specified in the revised Forest Plan. These changes, if necessary, **would be addressed in site-specific analysis at the time a leasing proposal is considered.**

Forest Plan FEIS at 3-103. Thus, because the agencies have failed to cite to any site-specific analysis that occurred prior to proposing parcels within the Uinta National Forest for leasing, the lease sale for the fourteen parcels cannot go forward.

The requirement to conduct site-specific analysis prior to leasing applies not only to the consequences of oil and gas development on roadless areas, but applies to impacts on all of the

⁴ The decision to require site-specific environmental analysis prior to leasing is not reflected in the Western Uinta Basin Oil and Gas EIS.

significant resource values associated with relevant Uinta National Forest lands including wildlife habitat, fisheries, watersheds, riparian areas, and scenic qualities. During the forest plan revision process, the Forest Service acknowledged the adverse impacts of oil and gas development on many of these resource values. For example, according to the Forest Service, “[p]otential adverse effects of oil and gas exploration on the soil resources include accelerated erosion and mass wasting, gully development, decreased slope stability, and long-term loss of site productivity....Effects on soils may be irreversible depending upon the success of rehabilitation.” Forest Plan FEIS at 3-34; *see also* Forest Plan FEIS at 3-18 (“Sediment from [unsurfaced road] erosion, however, often affects water quality”). In addition, the Forest Service finds that:

Roads can directly impact wildlife habitat by fragmenting it, but roads also negatively impact wildlife indirectly by facilitating activities that harm wildlife such as harvest of key habitat features such as snags and logs; overhunting; over-trapping; animal collection; and human disturbance at sensitive sites such as leks, nest sites, caves, and winter range. These impacts can create chronic negative effects that can affect distribution and abundance patterns of wildlife over time.

Forest Plan FEIS at 3-283-284. The Forest Service also has recognized the adverse impacts of oil and gas development on fisheries. Forest Plan FEIS at 3-231 (“Direct affects to aquatic and semi-aquatic species include the potential loss or displacement of individuals or habitats of species from construction activities. Indirect effects from ground disturbing activities are water quality problems as a result of sediment entering rivers and streams. . . .”).

These findings have been echoed in a recently released report by Trout Unlimited that concludes oil and gas development adversely impacts hunting and fishing, even where total surface disturbances are small, by contaminating ground an surface water, reducing water quantity, degrading fish habitat, and fragmenting wildlife corridors, calving grounds and nesting areas. Trout Unlimited, *Gas and Development on Western Public Lands*, available at: www.vallevidal.org/Downloads/TU_Oil_Gas_low.pdf also points to the significant adverse effects of oil and gas development on viewsheds and aesthetics – the development drastically changes the landscape where hunting, fishing and wildlife viewing take place. *Id.*

The need for additional site specific analysis is further demonstrated by the Uinta National Forest Plan’s proclamation that “[i]mproving and maintaining watersheds remains one of the main goals of the Uinta National Forest today, and is coupled with our continued understanding of ecosystems and their management requirements.” 2003 Uinta National Forest Plan at 1-1. In fact, the Forest Plan is intended to insure that “[f]orest management activities are implemented in a manner that prevents unacceptable watershed impacts.” 2003 Uinta National Forest Plan at 5-1. However, the agencies have proposed oil and gas development in crucial watershed areas without any analysis of the anticipated impacts. *See* Draft Western Uinta Basin Oil and Gas EIS at 3-35 (Diamond Fork IRA – “valuable as a watershed area”); *Id.* at 3-64 (Red Mountain IRA – “very important” watershed); Forest Plan EIS at Appendix C (description of IRAs).

In fact, the Revised Forest Plan EIS did not analyze the affects of any mineral development in the Diamond Fork IRA, Forest Plan FEIS at C-111, Red Mountain IRA, *Id.* at C-98, Two Tom Hill IRA, *Id.* at C-91, and Pump Ridge IRA, *Id.* at C-85. Rather, the Forest Service assumed that the final management prescriptions would result in no mineral development in these roadless areas. Accordingly, the impacts of this lease sale as well as the September and December 2004 lease sales have never been analyzed for these IRAs, nor are they prescribed by the Forest Plan.

Also, the Forest Service completed its inventory for rivers eligible for protection under the Wild and Scenic Rivers Act in 1998, **after** it completed the Western Uinta Basin Oil and Gas EIS.⁵ Forest Plan FEIS at 3-608. The Forest Service determined the entire 7.8 miles of Fifth Water Creek to be eligible for designation as scenic under the Wild and Scenic River Act. Forest Plan FEIS at 3-609. Much of Fifth Water Creek is located in the Diamond Fork IRA. Forest Plan FEIS at 3-617. The Forest Service concluded that Fifth Water Creek is eligible for scenic designation because the creek is "free of impoundments, with shorelines or watersheds still largely primitive and shorelines largely undeveloped, but accessible in places by roads." 16 U.S.C. § 1273(b)(2). In assessing the cumulative impacts to Fifth Water Creek, the Forest Service states, "[t]he **requirements of [the Roadless Rule] provide additional protection for** this segment by prohibiting all new road construction or reconstruction within these roadless areas." Forest Plan FEIS at 3-617(emphasis added). However, the agencies decision to lease parcels within the Diamond Fork IRAs ignores anticipated protections of the illegally revoked roadless rule, which is no longer in effect, and as such, removes the protections for Fifth Water Creek anticipated by the revised Forest Plan. Accordingly, a site-specific analysis of impacts to this Wild and Scenic eligible watercourse is necessary.

Site specific analysis is further compelled by the fact that the Forest Service admits that oil and gas development has an adverse impact on water quality and that Diamond Fork and Sixth Water creeks are impaired waters. At the same time, all of the streams impacted by the leasing decision have been designated by the State of Utah as high quality waters. State regulations mandate that the quality of these waters will be strictly maintained. Already these waters are ailing and additional impacts to the water quality of these waters will further impair the beneficial uses of these streams, thereby violating state water quality standards.

That the agencies must consider water quality impacts prior to allowing these areas to be leased for oil and gas development is particularly true given that the resulting development will exacerbate the very conditions that have placed these waters on the state's list of impaired waters. Forest Plan FEIS at 3-34 ("[p]otential adverse effects of oil and gas exploration . . . include accelerated erosion and mass wasting, gully development, decreased slope stability, and long-term loss of site productivity....Effects on soils may be irreversible depending upon the success of rehabilitation"); Forest Plan FEIS at 3-18 ("Sediment from [unsurfaced road] erosion . . . often affects water quality"); Forest Plan FEIS at 3-231 ("Direct affects to aquatic and semi-

⁵ Obviously, then, the Western Uinta Basin Oil and Gas EIS could not consider the environmental impacts of oil and gas development in light of the Forest Services' determination that Fifth Water Creek is eligible for designation as a Wild and Scenic River and should be managed as such.

aquatic species include the potential loss or displacement of individuals or habitats of species from construction activities. Indirect effects from ground disturbing activities are water quality problems as a result of sediment entering rivers and streams. . . ."); Forest Plan FEIS at C-16 ("Activities such as . . . development projects, road construction . . . and . . . oil and gas exploration have the potential to negatively impact" water quality "by altering the rates of runoff, surface erosion, and sediment delivery to the streams"). Moreover, because much of the area open for oil and gas development is characterized by unstable soils that are naturally high in phosphorous,⁶ activities associated with oil and gas development will have a pronounced adverse affect on water quality in the already impaired waters of the area. See Forest Plan FEIS at C-17.⁷

As repeated above, analysis of water quality impacts must occur at the leasing stages because it is at this time that an irretrievable commitment of resources is made. For example, based on the unstable soils and other factors in the proposed parcels, the only way to avoid violations of the Clean Water Act is likely NSO stipulations that are more restrictive than those currently attached to the proposed parcels. This underscores the need to conduct a site-specific environmental analysis before any irretrievable commitment of resources, such as oil and gas leasing. Failure to undertake this analysis now is not only a violation of NEPA and NFMA, but also the Clean Water Act. See 33 U.S.C. § 1323 (Federal agencies must comply with state water quality standards).

Moreover, as part of the site-specific analysis of oil and gas development in the Uinta Nation Forest, the agencies must assess the cumulative impacts of oil and gas exploration and development. Cumulative impacts are the "impacts[s] on the environment which result[] from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of the agency." 40 C.F.R. § 1508.7. The Forest Service has approved two timber sales this year west of Strawberry Reservoir and additional timber sales are currently undergoing NEPA analysis. The effect of the anticipated timber harvest activities must be analyzed in conjunction with oil and gas development.

Also, the leasing of the protested parcels is clearly inconsistent with the Revised Forest Plan. Many of the stipulations from the Revised Forest Plan have not been incorporated into the lease notice for the parcels at issue, as required by Forest Plan Standard M&E-13 and NFMA. For example, with respect to northern goshawk and Bonneville Cutthroat trout, a species found in the Diamond Fork IRA, the EIS states under the heading "Effects of Wildlife Management on Leasable Minerals":

Examples of CSU or TL stipulations that may be applied under all alternatives would be restricting access 30 to 180 acres around northern goshawk nests and complete avoidance of greater sage grouse leks. The same stipulations (though

⁶ Available at: <http://www.cuwcd.com/cupca/projects/uls/index.htm>; see also *infra*, n. 1 and 2 (Strawberry Valley and Diamond Fork Assessments).

⁷ It is important to note that excessive phosphorous has a direct adverse impact on fisheries. The addition of this nutrient to water, especially in combination with increase temperatures, causes excessive algae growths that, *inter alia*, rob the water of oxygen and kill fish.

primarily TL) would apply to the habitat of fish species such as Bonneville and Colorado River cutthroat trout.

Oil and Gas FEIS at 115-116. Yet these CSU and TL stipulations have not been applied to the parcels at issue. Instead, Forest Service simply states that the mandates of Oil and Gas EIS have been incorporated by reference into the Revised Forest Plan, but fails to recognize the stipulations required by the Forest Plan. The Forest Service's failure to apply lease stipulations in a manner consistent with the 2003 Forest Plan thus violates NFMA.

Accordingly, the agencies are compelled to withdraw the proposed parcels from the lease sale. The agencies have failed to conduct additional site-specific analysis of the proposed parcels. This site-specific analysis is required by NEPA and mandated by the Uinta National Forest Plan. Moreover, the sheer importance of the resources found in the lease area and vulnerability of these resources to oil and gas development necessitates site specific environmental analysis before the leasing of the parcels can proceed.

VI. THE FOREST SERVICE VIOLATED THE FEDERAL ONSHORE OIL AND GAS LEASING REFORM ACT BY FAILING TO COMPLETE THE REQUIRED TWO-STAGE ANALYSIS OF THE WCNF PARCELS

The Federal Onshore Oil and Gas Leasing Reform Act "authorized the Secretary of Agriculture to develop procedures and regulations governing leasing for oil and gas resources . . . with the National Forest System." 55 Fed. Reg. 10423 (March 21, 1990). The Secretary of Agriculture promulgated regulations to implement this Act, which in relevant part, are codified at 36 C.F.R. § 228.102. Pursuant to the implementing regulations:

the decision as to whether to authorize the Bureau of Land Management to offer National Forest System land for leasing is made at the conclusion of the second stage of the process set forth in the rule. The second stage is referred to as the 'leasing decision for specified lands.'

55 Fed. Reg. at 10428-29.

Pursuant to the second stage of the Forest Service's leasing decision-making process, the Regional Forester shall offer specific lands for lease subject to:

1) Verifying that oil and gas leasing of the specific lands has been adequately addressed in a NEPA document, and is consistent with the Forest land and resource management plan. If NEPA has not been adequately addressed, or if there is significant new information or circumstances [] requiring further environmental analysis, additional environmental analysis shall be done before a leasing decision for specific lands will be made. If there is inconsistency with the Forest land and resource management plan, no authorization for leasing shall be given unless the plan is amended or revised.

2) Ensuring that conditions of surface occupancy identified in § 228.102(c)(1) are properly included as stipulations in resulting leases.

3) Determining that operations and development could be allowed somewhere on each proposed lease, except where stipulations will prohibit all surface occupancy.

36 C.F.R. § 228.102(e).

Accordingly, the decision to authorize BLM to offer forest parcels for leasing is “dependent on the results of three determinations that the Forest Service must make.” 55 Fed. Reg. at 10429. However, the Forest Service has failed to make each finding for the Uinta NF parcels. First, the protested parcels have not been adequately analyzed in a NEPA document and are not consistent with the Revised Forest Plan. Second, the applicable stipulations have not been included for the protested parcels. And, third, oil and gas operations should not occur on roadless parcels absent NSO stipulations.

The Forest Service has acknowledged this staged process for oil and gas leasing decision. Forest Plan FEIS at G-7. Although the Forest Service states that leasing specific lands decisions are “based on environmental analysis and disclosure of the probable effects in accord with NEPA,” the Forest Service has not sufficiently complied with NEPA or provided NEPA opportunities for public participation. Forest Plan FEIS at G-8-8. Moreover, the specific decision to lease the Uinta NF parcels is not “appealable to the responsible Federal agency” as indicated by the Forest Plan FEIS. Forest Plan FEIS at G-8. The Forest Service has not provided an appeal opportunity to the regional forester, but rather the only recourse for Red Rock Forests, at this time, is this protest to BLM. Accordingly, the Forest Service failed to comply with its oil and gas leasing regulations. Therefore, the WCNF parcels must be withdrawn from the February lease sale.

VII. THE AGENCIES FAILED TO CONSIDER THE PROPOSED WITHDRAWAL OF PORTIONS OF THE UINTA NATIONAL FOREST PARCELS FROM U.S. MINING LAWS

On October 22, 2004, the Bureau of Land Management issued a Notice of Proposed Withdrawal from U.S. Mining Laws of 6,450 acres of Uinta National Forest lands “to protect the Utah Lake and the Diamond Fork Systems.” Bureau of Land Management, *Notice of Proposed Withdrawal and Notice of Public Meeting; Utah*, 69 Fed. Reg. 62075 (October 22, 2004). More specifically, “the purpose of the proposed withdrawal is to protect the Federal investment in the proposed Utah Lake and the Diamond Fork Systems, Bonneville Unit of the Central Utah Project.” *Id.* The duration of the proposed withdrawal is 20 years. *Id.* However, BLM notes that the proposed withdrawal will be “subject to valid existing rights.” *Id.*

Certain parcels proposed for leasing overlap with lands proposed for withdrawal. There is no evidence that the agencies considered the proposed withdrawal in the Western Uinta Basin Oil and Gas EIS or during the Forest Plan Revision process. At a minimum, this proposed withdrawal evidences the agencies opinion that oil and gas development in these areas is not consistent with management objective. However, the agencies failed to evaluate this conflict.

As discussed above, the agencies must assess the cumulative "impacts[s] on the environment which result[] from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of the agency." 40 C.F.R. § 1508.7; *see also* 40 C.F.R. § 1508.23. Certainly the withdrawal from U.S. mining laws of certain portions of the proposed parcels is reasonably foreseeable and falls under CEQ's definition of a proposal. As such, the agencies should have considered the inconsistency of the withdrawal and leasing during the NEPA process. Because the agencies failed to do so, the overlapping parcels should be withdrawn and any future leasing must require NSO stipulations.

VIII. ESA REQUIRES THAT THE FOREST SERVICE CONSULT WITH THE FWS REGARDING ESA SPECIES' HABITAT BEFORE LEASING.

The DOI Office of the Solicitor for the Rocky Mountain Region has concluded that the ESA requires the Forest Service and BLM to complete consultation with the FWS before issuing a lease that encompasses habitat occupied by threatened or endangered species:

[T]he Department of the Interior may not deny all rights to drill on a Federal oil and gas lease, unless it has expressly reserved that right in the initial lease terms by, for example, imposing a no surface occupancy stipulation (NSO). This means that the appropriate stage for comprehensive study in the case of endangered species . . . is the leasing stage. . . . This also means that in the absence of an NSO stipulation biological opinions need to be completed at the leasing stage to determine whether the Department must expressly reserve the right to prohibit all surface activity on the lease.

Memorandum from Regional Solicitor, Rocky Mountain Region, to Regional Director, Fish and Wildlife Service, Region 6, at 2 (Nov. 18, 1992).

The protested parcels are known to contain habitat for species listed pursuant to the ESA. For example, the Diamond Fork IRA contains habitat for the threatened bald eagle. Forest Plan FEIS at C-113. As well, Diamond Fork IRA contain potential habitat for the endangered Canada lynx. Forest Plan FEIS at C-113; and C-119.

Section 7 of the ESA commands that all federal agencies "shall, in consultation with and with the assistance of" FWS: (1) "utilize their authorities in furtherance of the purposes of [the ESA] by carrying out programs for the conservation of endangered and threatened species," 16 U.S.C. § 1536(a)(1), and (2) "insure that any action authorized, funded, or carried out by any agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species." *Id.* at § 1536(a)(2). DOI regulations implement this consultation requirement by directing that formal consultation is required before a federal agency may take "any action [that] may affect listed species." 50 C.F.R. § 402.14(a). As the Supreme Court has observed, "[t]his language admits of no exception." *Tenn. Valley Authority v. Hill*, 437 U.S. 153, 173 (1978). Indeed, by regulation "the granting of . . . leases" is an action requiring formal consultation under Section 7. 50 C.F.R. § 402.02.

The agencies have not consulted with FWS on the fourteen Uinta National Forest parcels.⁸ In fact, FWS has not provided a comment/consultation letter on any of the parcels offered in this lease sale. Accordingly, the agencies have failed to fulfill their duty to consult with FWS prior to leasing.

In addition, the agencies must adhere to the Canada Lynx Conservation Assessment and Strategy ("LCAS"). The agencies developed the action plan "to provide a consistent and effective approach to conserve Canada lynx on federal lands in the conterminous United States." LCAS at Executive Summary. In drafting the LCAS, the agencies recognized that "[t]he development of wells can impact lynx habitat. However, the greatest impact is likely the development of road access to facilitate exploration and development." LCAS at 28.

Thus, ESA consultation has not occurred for the fourteen Uinta National Forest parcels. Because the agencies have not consulted with FWS, they cannot offer the parcels for development without NSO stipulations. Alternatively, absent adequate consultation, Red Rock Forests can file 60-day notice letters pursuant to 16 U.S.C. § 1540(g)(2), and subsequently litigate any ESA violations. The agencies can avoid litigation by canceling the lease sale of the subject lands or imposing NSO stipulations.

IX. THE LEASING PROPOSAL FAILS TO PROVIDE FOR A DIVERSITY OF PLANT AND ANIMAL COMMUNITIES

A. THE FOREST SERVICE FAILED TO ADDRESS IMPACTS TO SENSITIVE SPECIES

By not conducting a site-specific analysis of the direct, indirect, and cumulative impacts of the lease sale, the Forest Service has failed to provide for a diversity of plant and animal communities on the Uinta National Forest. As part of the NEPA process, the Forest Service is required to prepare a site-specific biological evaluation to determine the potential effect of leasing on sensitive species. Forest Service Manual (FSM) at 2670.32 ("As part of the National Environmental Policy Act process, review programs and activities, through a biological evaluation, to determine their potential effect on sensitive species"). A site-specific EA or biological evaluation is needed to analyze the potential effect of oil and gas development on sensitive forest species, and to ensure that leasing would not threaten the viability of Forest Service sensitive species.

The Forest Service's obligation to manage fish and wildlife habitat "provide for diversity of plant and animal communities", 36 U.S.C. § 1604(g)(3)(B), is particularly relevant to sensitive species. Sensitive species are

[t]hose plant and animal species identified by the Regional Forester for which population viability is a concern, as evidenced by: (1) significant current or predicted downward

⁸ In addition, consultation with FWS should have occurred pursuant to the Fish and Wildlife Conservation Act, 16 U.S.C. 661 *et seq.*, which provides for "the coordination of wildlife conservation and rehabilitation."

trends in population numbers or density; or, (2) significant current or predicted downward trends in habitat capability that would reduce a species' existing distribution.

FSM, Sec. 2670.5(19). For sensitive species, the Forest Service is required to: (1) develop and implement management practices to ensure that species do not become threatened or endangered because of Forest Service actions; (2) maintain viable populations of all native and desired non-native wildlife, fish, and plant species in habitats distributed throughout their geographic range on National Forest System lands; and (3) develop and implement management objectives for populations and/or habitat of sensitive species. FSM, Sec. 2670.22. As stated above, on the site-specific level, through the NEPA process, the Forest Service must "review programs and activities, through a biological evaluation, to determine their potential effect on sensitive species." FSM, Sec. 2670.32(2). If impacts from forest plan implementation cannot be avoided, the Forest Service must "analyze the significance of potential adverse effects *on the population or its habitat* within the area of concern and on the species as a whole." FSM, Sec. 2670.32(4) (emphasis added).

The Uinta National Forest provides habitat for seventeen sensitive species. Forest Plan FEIS at 3-291.⁹ For example, the Diamond Fork IRA provides habitat for the Northern goshawk, peregrine falcon, flammulated owl, spotted bat, three-toed woodpecker, and Bonneville cutthroat trout. Forest Plan FEIS at C-113; *see* Statement of Facts, *supra* (all IRAs provide sensitive species habitat). Despite the presence of these sensitive species and their habitat within the fourteen parcels, the agencies have not assessed the impact of oil and gas development on these species with known viability concerns. This omission is particularly troublesome given the Forest Service's expectation that "little [habitat] will likely be lost or fragmented under the revised Forest Plan" and acknowledgement that "[t]he value of the Uinta National Forest as an area where ecosystem structure and function and biodiversity are maintained will become important as Utah's population continues to grow." Forest Plan FEIS at 3-308-309. Further, the failure to conduct this analysis is underscored by the fact that the Oil and Gas EIS and the Forest Plan are based on a determination that only 6.9 acres of forest lands will be disturbed by oil and gas development and that this level of impact has already been reached on the forest. Draft Western Uinta Basin Oil and Gas EIS at 4-51 to 52; Forest Plan at 3-113 ("it is anticipated that the scenario for an oil and gas well would average one well over a 15 year period"); 3-111 to 112 (determination "that leasing activities would have very little physical impact on most other resources on the Forest . . . based on the fact that oil and gas leasing with production activities have not occurred in the past nor is it anticipated that significant activities will occur in the future"); 3-106 ("it was assumed that a well would be drilled sometime during the next decade").

⁹ Habitat occurs on the Uinta National forest for: Barneby woody aster (*Aster kingii* var. *barnebyana*); Dainty moonwort (*Botrychium crenulatum*); Garrett's bladderbodd (*Lesquerella garrettii*); Rockcress draba (*Draba globosa*); Wasatch jamesia (*Jamesia americana* var. *macrocalyx*); Boreal owl (*Aegolius funereus*); Flammulated owl (*Otus flammeolus*); Great gray owl (*Strix nebulosa*); Northern goshawk (*Accipiter gentiles*); Peregrine falcon (*Falco peregrinus*); Three-toed woodpecker (*Picoides tridactylus*); Spotted bat (*Euderma maculatum*); Townsend's big-eared bat (*Plecotus townsendii*); wolverine (*Gulo gulo*); Columbia spotted frog (*Rana luteiventris*); Bonneville cutthroat trout (*Oncorhynchus clarki utah*); and, Colorado River cutthroat trout (*Oncorhynchus clarki pleuriticus*).

Also of note is that the State of Utah has developed a conservation agreement for the Bonneville cutthroat trout, intended to "[e]nsure the long-term conservation of the [Bonneville cutthroat trout] within its historic range in Utah." Utah Dept. of Natural Resources, Conservation Agreement and Strategy for Bonneville cutthroat trout in the State of Utah, *available at*: <http://mountain-prairie.fws.gov/species/fish/bct/UtahConservationAgreement.pdf> ("BCT Conservation Agreement"). This agreement represents "a collaborative and cooperative effort among resource agencies," including the Forest Service., BCT Conservation Agreement at 2. The BCT Conservation Agreement recognizes that potential threats to the cutthroat trout include "road building with associated sedimentation and migration corridor blockage, and water depletions for dust control, maintenance activities, and fossil fuel exploration." BCT Conservation Agreement at 30.

The BCT Conservation Agreement designates the area which encompasses the fourteen parcels "the Northern Bonneville Management Unit" and finds that, for the Bonneville cutthroat populations in this areas, "[f]ragmentation is probably the greatest threat." BCT Conservation Agreement at 52. As part of the BCT Conservation Agreement, the Forest Service has agreed that "[i]mpacts from existing and proposed watershed development that affects riparian and instream habitats should be assessed and mitigation should be determined on a case-by-case development." BCT Conservation Agreement at 53. However, despite the Forest Service's acknowledgement that "[a]ctivities such as ... road construction ... oil and gas exploration have the potential to negatively impact [water] resource[s] by altering the rates of runoff, surface erosion, and sediment delivery to streams," Forest Plan FEIS at C-16, the Forest Service has not conducted site-specific analysis of the impacts of oil and gas exploration and development on Bonneville cutthroat trout. *See also* Forest Plan FEIS at C-18 ("Unroaded areas are more likely than roaded areas to support greater ecosystem health. They are more likely to... provide habitat for threatened, endangered, sensitive, candidate, and proposed species and Species Evaluated for Viability, as well as by providing habitat corridor linkages for all wildlife and interconnected aquatic habitat for fish metapopulations"). In addition, the Forest Service has failed to comply with the revised Forest Plan guideline to "avoid management activities that would significantly reduce aquatic and riparian habitat or significantly retard its rate of recovery" for Bonneville or Colorado cutthroat trout. 2003 Forest Plan at 3-2.

Without site-specific analysis, the agency simply lacks the information to fulfill this and other management duties relative to these imperiled fish and the other sensitive species that rely on the lands and water resources encompassed by the fourteen parcels. As a result, the lease sale is premature and the fourteen parcels must be dropped from the proposed offering.

B. THE FOREST SERVICE FAILED TO ADEQUATELY ADDRESS IMPACTS TO MIS, MIS HABITAT, AND MIS POPULATIONS

Pursuant to NFMA, the Forest Service is required to "provide for the diversity of plant and animal communities..." 16 U.S.C. § 1604(g)(3)(B). Since 1983, the Forest Service has used Management Indicator Species (MIS) to ensure species viability on the forests. However, the Forest Service has recently amended its regulations to avoid this responsibility. This decision to

remove MIS monitoring requirements from NFMA implementing regulations is currently being litigated in several courts. Accordingly, until courts have sufficiently resolved challenges to the Forest Service's new NFMA implementing regulations, the agencies should adhere to MIS requirements to ensure species viability on the Uinta National Forest. Moreover, MIS monitoring requirements are mandated by the Revised Forest Plan and, as such, compliance at the leasing stage remains necessary to guarantee consistency with the Forest Plan.

The Management Indicator Species (MIS) for the Uinta National Forest are the Northern goshawk, American beaver, three-toed woodpecker, and Bonneville cutthroat trout. Uinta National Forest Plan at 6-5 to 6-7. Here, the Forest Service violated NFMA's MIS provisions. The agency failed to conduct a quantitative analysis of MIS population trends and determine the impacts of the proposed leasing on these populations prior to offering the parcels for oil and gas development. 36 C.F.R. §§219.19 and 219.26 (1999). This collection of data and analysis must occur prior to leasing, as leasing is an irretrievable commitment of resources. Pennaco Energy, Inc. v. Dept. of Interior, 2004 WL 1776013, at 9 (10th Cir. 2004). Pennaco also establishes that, prior to leasing, the agencies are required to consider whether coalbed methane development might result in unique impacts not analyzed in an existing NEPA document.

Many of the roadless areas proposed for leasing provide habitat for designated MIS. Each of the proposed IRA parcels provides habitat for the Northern goshawk. Forest Plan FEIS at C-113 (Diamond Fork IRA – “provides habitat for the northern goshawk”). The Diamond Fork IRA provides habitat for the three-toed woodpecker. Forest Plan FEIS at C-113. In addition, the Diamond Fork IRA provide habitat for Bonneville cutthroat trout. Forest Plan FEIS at C-113 and C-119.

Unless it is technically infeasible and not cost-effective, the Forest Service is required to collect and analyze quantitative population data, both actual and trend, for MIS in relation to any proposed action and prior to any irretrievable commitment of resources. Sierra Club v. Martin, 168 F.3d 1, 6-7 (11th Cir.1999) (MIS regulations require collection of quantitative population data); Inland Empire Public Lands Council v. United States Forest Service, 88 F.3d 754, 763 n. 12 (9th Cir.1996) (where data for MIS were not available because the species was reclusive, the Forest Service properly used habitat trend data rather than acquiring actual population counts because there was no technically reliable and cost-effective method of counting individual members of the species); Utah Envtl. Congress v. Zieroth, 190 F.Supp.2d 1265, 1271 (D. Utah 2002) (Forest Service failed to comply with regulations where failure to collect data was not due to any inability to collect it, but to an agency decision not to collect it); Forest Guardians v. United States Forest Service, 180 F.Supp.2d 1273, 1282 (D. NM 2001)(Forest Service obligated as a matter of law to acquire and analyze both actual and trend MIS population); Colorado Wild v. Forest Service, 299 F.Supp.2d 1184 (D. Colo. 2004)(granting summary judgment where Forest Service failed to conduct a quantitative analysis of MIS population trends). The MIS requirement applies at both the forest plan stage and **subsequent project level decisions**. See Martin, 168 F.3d at 6 n. 9 (citing Inland Empire, 88 F.3d at 760 n. 6); Zieroth, 190 F.Supp.2d at 1270 n. 1. Actual and trend population data must be collected **before** decisions are made to allow the Forest Service to evaluate data and monitor population trends. Martin, 168 F.3d at 6.

Here, the Forest Service lacks the required MIS data and analysis to approve the leasing of the fourteen parcels for oil and gas development. Nothing in the Forest Plan or the Oil and Gas EIS gathers and relates MIS data to the specific leasing decision. Under its illegally revoked regulations, the Forest Service must gather and apply present population data for the MIS to determine relationships between the habitat impacts and population changes for the leasing proposal. The agency must provide and evaluate such data and impacts, at a minimum, in a site-specific EA. Site-specific analysis must address the impacts of future oil and gas development under each leases to MIS, MIS populations, and MIS habitat.

In sum, until the legality of the new forest planning regulations is determined, project-level decisions such as leasing must be informed by MIS data. Absent a site-specific MIS analysis or population trend data, the agency has not determined the relationship between population trends and MIS habitat changes brought about by the proposed leasing as required by the illegally revoked 36 CFR § 219.19(a)(6). As a result, the lease sale violates NFMA.

X. LEASING THE ROADLESS PARCELS VIOLATES THE NATIONAL HISTORIC PRESERVATION ACT.

The IBLA has recently determined that the agencies must make a good faith attempt to “identify ‘historic properties’ located on the subject parcels” during the leasing process. Southern Utah Wilderness Alliance, 164 IBLA 1, 23 (2004). Accordingly, the IBLA has made clear that “[c]ompliance with section 106 [of the National Historic Preservation Act] at the leasing stage is intended to ascertain [] the presence of historic properties, including unidentified but identifiable eligible properties.” Id. at 28. Identification of cultural resources is a necessary step in the National Historic Preservation Act in order to ensure that agencies “evaluate alternatives or modifications to the undertakint that could avoid, minimize, or mitigate adverse effects on historic properties.” 36 C.F.R. § 800.5(2). Neither the Western Uinta Basin Oil and Gas EIS or the Forest Plan Revision EIS made any attempt to identify cultural resources in the parcels proposed for leasing.

Moreover, during the forest plan revision process, the Forest Service recognized that “[b]y the end of September 2000, less than 8 percent of the Forest (72,769 acres) had been surveyed for archaeological and historical sites, and only 362 sites had been documented.” Forest Plan FEIS at 3-421. Despite the limited surveying, the Forest Service has identified 122 sites that date to American Indian settlement prior to European arrival (c. 8,000 B.C. to A.D. 1776). Forest Plan FEIS at 3-421. An additional 240 sites, “date from the historic European-American era (after A.D. 1776), and include mines, logging camps, water control features, livestock grazer’s camps, homesteads, military camps, and Forest management facilities.” Forest Plan FEIS at 3-421. The Forest Service had recognized that that “oil and gas management can also produce adverse effects on heritage resources through road and pad construction.” Forest Plan FEIS at 3-425.

Also, under the revised forest plan, the Forest Service established the following goal pertaining to cultural sites:

Plants and use areas associated with traditional uses (e.g., sustenance, medicine, and ceremony) that are culturally significant to Native American communities are identified and maintained or protected

2003 Forest Plan at 2-17. In fact, the Forest Service established an objective to “comprehensively address inventory, evaluation, interpretation, and protection of heritage resource” issues by 2008. 2003 Forest Plan at 2-18.

Beyond these objectives, pursuant to the National Historic Preservation Act, the Forest Service must consult with tribes whose cultural sites are potentially affected by the leasing. 16 U.S.C. § 470 *et seq.*¹⁰ The letter and spirit of the NHPA requires BLM to consult with SHPO, Native Americans, and the public **before** the agency proceeds with undertakings that “may affect” listed or eligible historic properties. Leasing is the point of an irreversible and irretrievable commitment of resources, and thus constitutes an “undertaking” under the NHPA. *See* BLM Manual H-1624-1, Planning for Fluid Mineral Resources, Chapter I(B)(2); *see also* 36 C.F.R. § 800.16(y); *see also* Southern Utah Wilderness Alliance, 164 IBLA 1, 22 (2004) (“BLM concedes that the March 2002 lease sale is an undertaking under 36 CFR 800.16(y)”). The NHPA’s implementing regulations further confirm that the “[t]ransfer, **lease**, or sale of property out of federal ownership and control without adequate and legally enforceable restrictions or conditions to ensure long-term preservation of the property’s historic significance” results in an “**adverse effect**” on historic properties. *Id.* § 800.5(a)(2)(vii) (emphasis added). *See* 65 Fed. Reg. 77689, 77720 (Dec. 12, 2000) (Protection of Historic Properties - Final Rule; Revision of Current Regulations) (discussing intent of § 800.5(a)(2)(iii)). It is therefore at the leasing stage that the agencies may lose the ability to protect cultural resources. The agency cannot defer consultation until the APD phase of operations.

In addition to the NHPA, the agencies must ensure compliance with:

- Federal treaties, which vest Tribes with ongoing rights and the Federal government with ongoing responsibilities;
- The American Indian Religious Freedom Act, requiring consultation to identify traditional Native American spiritual practitioners’ concerns relative to proposed federal actions; and,

¹⁰ Form letters to tribal governments regarding planning documents are insufficient to meet the agencies’ duty under the NHPA to make a “reasonable and good faith effort” to seek information from Native American tribes. *See* Pueblo of Sandia v. United States, 50 F.3d 856 (10th Cir. 1995).

- Federal Executive Order 13007 on Native American Sacred Sites, requiring federal land management agencies to accommodate access to and ceremonial use of Indian sacred sites and to avoid adversely affecting these sites' physical integrity.

According to the Advisory Council on Historic Preservation, federal agencies should integrate Section 106 requirements under the NHPA with the requirements of the EO 13007: "Not only would it be more efficient to integrate the requirements, but it might also ensure that all issues and values are given appropriate and timely consideration." Advisory Council on Historic Preservation, *The Relationship Between Executive Order 13007 Regarding Indian Sacred Sites and Section 106* (available at <http://www.achp.gov/eo13007-106.html>).

Given these obligation, the agencies should have consulted with several tribes prior to the proposal to lease sale, including the Confederated Tribes of the Goshute Reservation, the Ute Indian Tribe, and the Northwestern Band of Shoshone. Indeed, the Northern Cheyenne Tribe of Montana has filed federal court litigation challenging the BLM's failure to comply with cultural resource and historic preservation law before authorizing coalbed methane development in the Powder River Basin. This litigation put the agencies and the federal government on notice of consultation requirements and the strong Native American interest in being involved in decisions involving oil and gas development. In North Dakota, the Three Affiliated Tribes of the Fort Berthold Reservation filed protests over the failure of responsible agencies to consult prior to leasing lands in the Little Missouri National Grasslands.

Because the agencies have failed to identify cultural resources prior to leasing the parcels must be withdrawn. In addition, because no consultation occurred, the agencies should withdraw the parcels from the lease sale and initiate consultation to determine whether leasing may affect listed or eligible historic properties. In the meantime, the agencies should initiate a dialogue with SHPO, Tribes, and the public on historic properties and cultural resource protection. SHPO review and tribal consultation cannot wait until after undertakings have been completed.

XI. LEASING THE ROADLESS PARCELS VIOLATES THE ILLEGALLY REVOKED ROADLESS RULE

On January 12, 2001, the Secretary of Agriculture issued the final Roadless Area Conservation Rule, generally prohibiting road construction to protect natural values in IRAs of the National Forest System. 66 Fed. Reg. 3244 (Jan. 12, 2001). The Roadless Rule prohibited new mineral leases that would allow new road construction within inventoried roadless areas. 36 C.F.R. § 294.12 (repealed).

On May 13, 2005, the Forest Service announced a new rule purportedly protective of IRAs. Essentially, the Forest Service established "a petitioning process that will provide Governors an opportunity to seek establishment of and adjustment of IRAs [with their state]." 70 Fed. Reg. 25653, 25654 (May 13, 2005). The legality of the Forest Service's new Roadless Rule is currently being determined through litigation as it appears the Forest Service violated the Administrative Procedures Act and NEPA in promulgating the rule. Accordingly, because the

leasing proposal does not accord the full range of protection required by the previous Roadless Rule and the legality of the new Roadless Rule is uncertain, the Forest Service should ensure compliance with both rules pending judicial resolution.

The previous Roadless Rule sets forth the Forest Service's legal obligations for these areas. The Forest Service may not ignore its dictates until the new Roadless Rule is determined to be legal. Essentially, the previous Roadless Rule prohibited oil and gas leasing in IRAs absent NSO stipulations. Because the Forest Service has not attached NSO stipulations to the parcels within IRAs, the Forest Service is violating the previous Roadless Rule.

Moreover, under the new Roadless Rule, the Forest Service has established a deadline of November 13, 2006 for the Governor of any State to petition the Forest Service "to promulgate regulations establishing management requirements for all or any portion [of an IRA]." 36 C.F.R. § 294.12. Yet, the Forest Service is proposing to lease parcels within IRAs prior to allowing Utah's Governor to petition for their protection. As such, the Forest Service is prejudicing the state petition process. Therefore, under the new Roadless Rule, the Forest Service should delay leasing in IRAs until the petition process has run its course.

If the parcels are not withdrawn, the agencies must condition leasing on imposing NSO stipulations – not subject to waiver or exemption – for all IRA lands within the proposed lease parcels to protect the full range of roadless area values as required by the previous Roadless Rule and as presumed by the new Roadless Rule.

XI. BLM HAS BROAD DISCRETION OVER LEASING DECISIONS.

The Mineral Leasing Act provides: "All lands subject to disposition under this chapter which are known or believed to contain oil or gas deposits may be leased by the Secretary." 30 U.S.C. § 226(a). In 1931, the Supreme Court found that the Mineral Leasing Act "goes no further than to empower the Secretary to lease [lands with oil and gas potential] which, exercising a reasonable discretion, he may think would promote the public welfare." United States ex rel. McLennan v. Wilbur, 283 U.S. 414, 419 (1931). A 1965 case stated that the Mineral Leasing Act "left the Secretary discretion to refuse to issue any lease at all on a given tract." Udall v. Tallman, 85 S.Ct. 792, 795 (1965) *reh. den.* 85 S.Ct. 1325. Thus, the BLM has discretionary authority to approve or disapprove minerals leasing of public lands.

At the point of submission of an application for lease to the federal government, no right has vested for the applicant and the BLM retains the authority not to lease:

The filing of an application which has been accepted does not give any right to lease, or generate a legal interest which reduces or restricts the discretion vested in the Secretary whether or not to issue leases for the lands involved.

Duesing v. Udall, 350 F.2d 748, 750-51 (D.C. Cir. 1965), *cert. den.* 383 U.S. 912 (1966); see Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1230 (9th Cir. 1988) ("[R]efusing to issue

[certain petroleum] leases ... would constitute a legitimate exercise of the discretion granted to the Secretary of the Interior"); McDonald v. Clark, 771 F.2d 460, 463 (10th Cir. 1985) ("While the [Mineral Leasing Act] gives the Secretary the authority to lease government lands under oil and gas leases, this power is discretionary rather than mandatory"); Burglin v. Morton, 527 F.2d 486, 488 (9th Cir. 1975) ("[T]he Secretary has discretion to refuse to issue any lease at all on a given tract"); Geosearch, Inc. v. Andrus, 508 F.Supp. 839 (D.C. Wyo. 1981) (leasing of land under Mineral Leasing Act is left to discretion of the Secretary of Interior). Similarly, IBLA decisions consistently recognize that the BLM has "plenary authority over oil and gas leasing" and broad discretion with respect to decisions to lease. Penroc Oil Corp., 84 IBLA 36, 39 (1985).

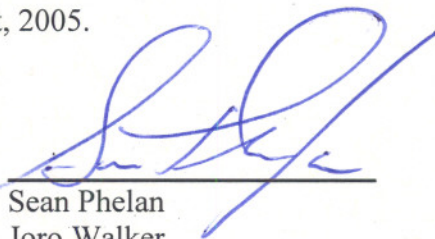
By withdrawing the protested parcels, BLM would properly exercise its discretionary authority under the Mineral Leasing Act. BLM should withdraw the Uinta National Forest parcels to ensure compliance with all applicable laws.

XII. CONCLUSION AND REQUEST FOR RELIEF

NEPA requires that the agencies take a hard look at the environmental impacts prior to offering these Uinta National Forest lands for leasing and to make the analysis available for public review and comment. The Revised Forest Plan also requires site-specific analysis prior to leasing. In addition, the agencies must consult with FWS on the proposed parcels within the Uinta NF. Also, NHPA requires identification of cultural resources and consultation with Tribes and other Native American groups prior to leasing. The agencies have failed to comply with these mandates.

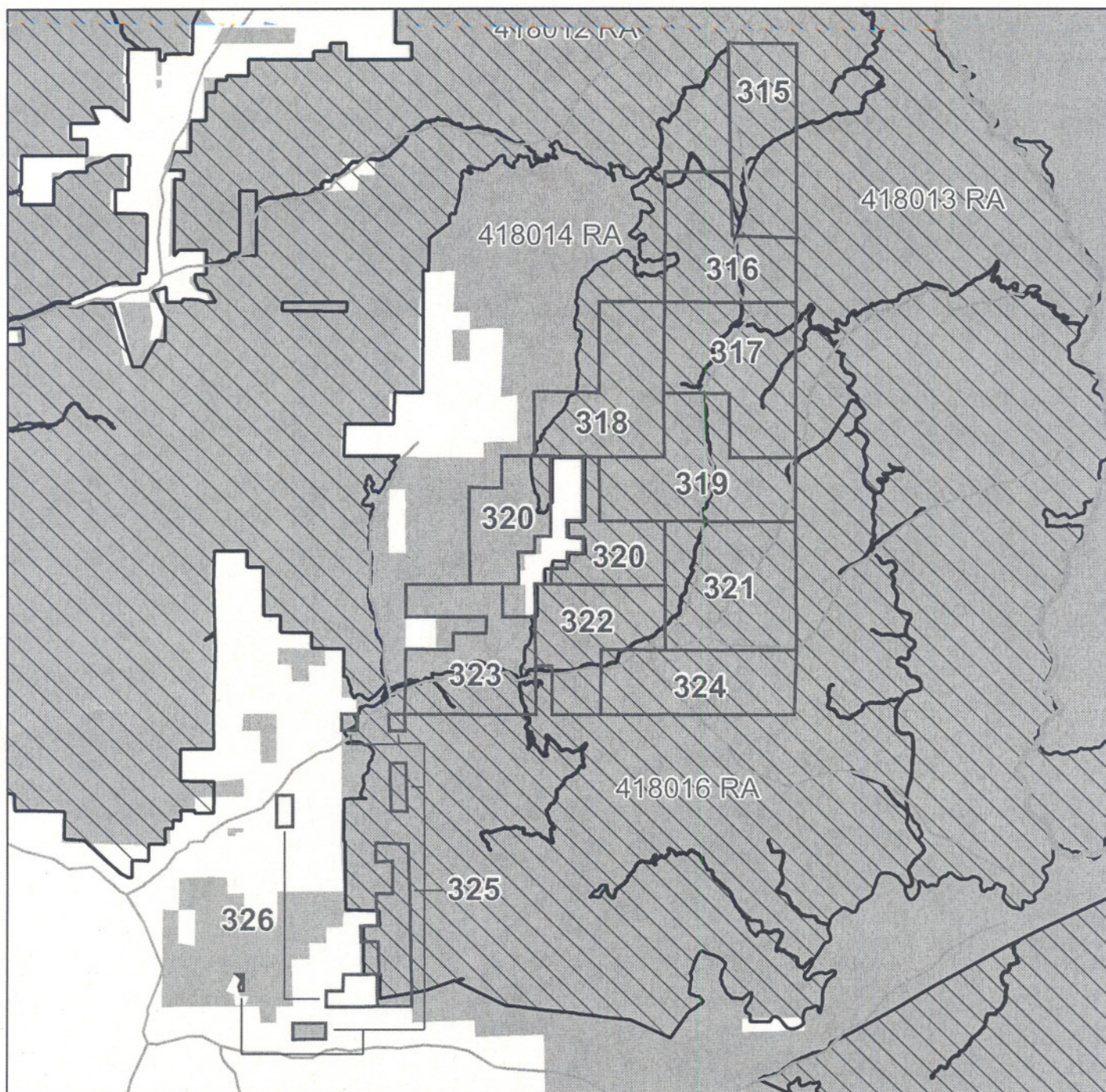
Therefore, Red Rock Forests respectfully requests that the agencies withdraw the protested parcels from leasing absent adequate protections for the substantial resource value of the proposed parcels, including roadless characteristics, ESA listed species, and cultural resources. In the event leases are issued for the protested parcels, Red Rock Forests also requests that the agencies provide notice of any APDs or other exploration and development activities proposed for these lands.

Respectfully submitted the 1st day of August, 2005.



Sean Phelan
Joro Walker

Attorneys for Red Rock Forests, Citizens'
Committee to Save Our Canyons, High Uintas
Preservation Council, Utah Rivers Council, Utah
Environmental Congress, and the Utah Chapter of
the Sierra Club



Uintah NF Lease Parcels - DETAIL *Federal Lease Sale - Utah BLM, August 16, 2005*

□ Lease Parcels (generalized to PLSS section)

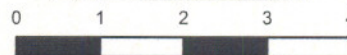
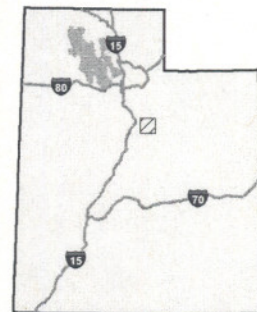
Land Management & Administration

BLM	USFS
BIA	State Parks & Rec Areas
DOD	State
NPS	Private
USFWS	

▨	Citizens' Wilderness Proposal
▧	USFS Roadless Area
▩	Area w/ Wilderness Character [^]
▤	BLM WSA
▥	Designated Wilderness

[^] 1998 BLM Wilderness Characteristics Inventory

Data Sources: BLM, NRDC, SITLA, USDA-FS, UT-AGRC, WUP



Scale in Miles

August 1, 2005